

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re the Matter of )  
COMPLAINT OF SKY ANGEL U.S., LLC )  
Against Discovery Communications, LLC, *et. al.* )  
For Violation of the Commission's Competitive )  
Access to Cable Programming Rules )

12-80 FILED/ACCEPTED  
File No. CSR-8605-P  
MAY 27 2011

Federal Communications Commission  
Office of the Secretary

To: Media Bureau

**MOTION OF SKY ANGEL U.S., LLC FOR IMPOSITION OF SANCTIONS  
AGAINST DISCOVERY COMMUNICATIONS, LLC FOR  
LACK OF CANDOR AND FOR POSSIBLE MISREPRESENTATION**

Pursuant to Section 76.1003(h)(2) of the Commission's rules, 47 C.F.R. §76.1003(h)(2), Sky Angel U.S., LLC ("Sky Angel"), by its attorneys, hereby urges the Commission to immediately impose sanctions against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery") for their overt and ongoing lack of candor before the Commission in this proceeding. Further, Sky Angel urges the Commission to open an investigation to determine if Discovery affirmatively misrepresented material facts to the Commission in its earlier submissions.<sup>1</sup>

Sky Angel initiated this proceeding, by concurrently filing a Program Access Complaint<sup>2</sup> and Emergency Petition for Temporary Standstill,<sup>3</sup> in an attempt to prevent Discovery from discriminating against Sky Angel by unjustifiably withholding its programming in violation of the Commission's program access rules and the parties' Affiliation Agreement. Although far more than a year has passed since Sky Angel filed its Complaint, the Commission has taken no

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<sup>1</sup> This Motion is filed concurrently with the *Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill (or Justice Delayed is Justice Denied)* ("Renewed Petition for Temporary Standstill").

<sup>2</sup> Sky Angel U.S., LLC, *Program Access Complaint* (filed Mar. 24, 2010) ("Complaint").

<sup>3</sup> See Sky Angel U.S., LLC, *Emergency Petition for Temporary Standstill* (filed Mar. 24, 2010) ("Temporary Standstill Petition").

action beyond preliminarily denying Sky Angel's March 24, 2010 Temporary Standstill Petition without prejudice to the ultimate resolution of this proceeding. In denying Sky Angel's request for a standstill, the Media Bureau (the "Bureau") specifically held that:

With respect to the third factor, we find that Discovery would be harmed from grant of the standstill as a result of 'damaged relationships' [REDACTED] and significant legal risks [REDACTED].<sup>4</sup>

In making this decisive determination that Discovery would suffer harm if the standstill were granted, or that the *status quo* between the parties should not continue during the pendency of the program access complaint proceeding, the Bureau obviously relied upon Discovery's unequivocal statements that it would be harmed by continuing its contractual relationship with Sky Angel. Discovery was terminating its voluntary (and profitable to Discovery) Affiliation Agreement with Sky Angel, under which Sky Angel had been distributing Discovery programming for more than 2½ years, expressly pursuant to IPTV technology, and which was not scheduled to terminate until December 31, 2014 – more than four years later.

Discovery repeatedly represented to the Commission that it never allows any Internet distribution of its linear programming channels in any way. A few examples of Discovery's representations include:

It is not unlawfully discriminatory for Discovery to decline to allow Sky Angel to distribute its programming services in a manner that is not permitted for any other distributor of those services.<sup>5</sup>

No other distributor of Discovery's programming networks uses the Internet as the distribution path to end users.<sup>6</sup>

[T]hese limitations stem both from content restrictions in Discovery's licensing agreements and from an executive decision at the highest levels of the Company

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<sup>4</sup> *Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879, 3883 (MB 2010) ("Preliminary Standstill Order") (citing Discovery Communications, LLC, *Opposition to Emergency Petition for Temporary Standstill*, pp. 4, 24-25 (filed Apr. 12, 2010)).

<sup>5</sup> Discovery Communications, LLC, *Answer to Program Access Complaint*, p. 26 (filed Apr. 21, 2010) ("Discovery's Answer").

<sup>6</sup> *Id.* at 27.

that it will refrain from online distribution of its content until a viable business model emerges that offers the Company proven value.<sup>7</sup>

Discovery repeatedly expressed concern about Sky Angel's use of the Internet, since no other distributor of Discovery's networks uses the Internet as a delivery mechanism.<sup>8</sup>

And contrary to Sky Angel's unsupported 'beliefs,' Discovery's programming networks are *not* part of TV Everywhere and Discovery does *not* give *any* distributor the rights Sky Angel seeks.<sup>9</sup>

These repeated and unequivocal statements by Discovery are false. Discovery is permitting millions of subscribers of large multichannel video programming distributors ("MVPDs") to access many (possibly all) of its linear programming channels via Internet distribution. For example, Discovery permits DISH Network to make ten Discovery programming channels available to its millions of subscribers over the Internet. Last year, DISH launched the first "true TV Everywhere" offering, "giving DISH Network subscribers the ability to watch all of their live and recorded television programs on compatible smartphones, tablets and laptops."<sup>10</sup> In other words, for no additional monthly fees, DISH customers may "enjoy their TV anywhere, anytime on a variety of popular devices"<sup>11</sup> so long as they "can connect to high-speed Internet or over a 3G cellular data plan."<sup>12</sup> "Unlike mobile viewing from cable and telcos that limit access to select programs, [DISH's] TV Everywhere service gives consumers 24 x 7

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<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3-4 (emphasis in original). See also *Motion of Discovery Communications LLC to Strike Unauthorized Pleading of Sky Angel U.S., LLC or, in the Alternative, Response to Emergency Request*, p. 4 (filed Apr. 15, 2010) ("Discovery does not allow any distributor to offer subscribers the right to port their service to multiple homes for the payment of a single subscriber fee."); *Objections and Responses of Discovery Communications, LLC to Sky Angel's Discovery Requests*, p. 8 (filed Apr. 16, 2010) ("Discovery also states in response to this document request that it does not allow any MVPD to distribute any Discovery linear channel over the Internet."); *id.* at 9 ("Discovery also states in response to this request that it does not allow any MVPD to distribute any Discovery linear channel over the Internet."); *id.* at 10 (making an identical assertion).

<sup>10</sup> *DISH Network Introduces America's First True TV Everywhere Offering*, DISH Network L.L.C. (Nov. 18, 2010) ("*DISH Press Release*") (available at <http://dishnetwork.mediaroom.com/index.php?s=8778&item=19745>).

<sup>11</sup> *Id.*

<sup>12</sup> See [www.dishnetwork.com/tveverywhere/whatistveverywhere/](http://www.dishnetwork.com/tveverywhere/whatistveverywhere/).

access to all of the live and recorded content included with their DISH Network programming subscription.”<sup>13</sup> Moreover, a DISH subscriber now has the added benefit of being able to watch one channel of programming from a remote location, via the Internet, while someone else watches different programming within the subscriber’s home.<sup>14</sup> DISH currently carries ten Discovery-owned networks, three of which – Discovery Channel, TLC and HD Theater – are included in the “DISH America” package, DISH’s least expensive programming package.<sup>15</sup>

In short, DISH subscribers have the ability to view Discovery channels from any broadband Internet connection in the United States. And yet, Discovery continues its representation to the Commission that it has never permitted any form of Internet distribution of its programming. At least equally blatant, Discovery expressly represented to the Commission that “Discovery’s programming networks are *not* part of TV Everywhere and Discovery does *not* give *any* distributor the rights Sky Angel seeks.”<sup>16</sup> But DISH is marketing and distributing Discovery channels to its millions of subscribers<sup>17</sup> as part of its “true TV Everywhere” Internet distribution service.<sup>18</sup>

DISH is far from alone among large MVPDs in providing Internet distribution of Discovery programming. Time Warner Cable (“TWC”) now offers a free iPad app that allows its subscribers to watch more than 70 channels of “live TV” (*i.e.*, linear channels), including ten Discovery channels, on their mobile iPad devices.<sup>19</sup> Likewise, Cablevision’s free iPad app

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<sup>13</sup> *DISH Press Release.*

<sup>14</sup> See [www.dishnetwork.com/faq/default.aspx?Category=DISH%20Remote%20Access/](http://www.dishnetwork.com/faq/default.aspx?Category=DISH%20Remote%20Access/). DISH has even incorporated its Slingbox technology into its leased set-top boxes. See [www.dishnetwork.com/tveverywhere/vip922/default.aspx](http://www.dishnetwork.com/tveverywhere/vip922/default.aspx).

<sup>15</sup> See [www.dishnetwork.com/packages/comparisonguide/default.aspx](http://www.dishnetwork.com/packages/comparisonguide/default.aspx).

<sup>16</sup> *Discovery’s Answer* at 3-4 (emphasis in the original).

<sup>17</sup> DISH reports that it currently serves more than 14.1 million subscribers. See <http://dishnetwork.mediaroom.com/index.php?s=8794>.

<sup>18</sup> A copy of DISH’s description of its “true TV Everywhere” offering is attached to this Motion.

<sup>19</sup> See [www.timewarnercable.com/neowpa/learn/cable/TWCableTV/TWCableTV\\_iPad.html](http://www.timewarnercable.com/neowpa/learn/cable/TWCableTV/TWCableTV_iPad.html).

allows its subscribers to access every channel in their cable TV package, including multiple channels of Discovery programming, on their mobile iPad devices.<sup>20</sup> These innovative new services have proved wildly popular. By late April, TWC's iPad app had already been downloaded 360,000 times, and Cablevision's iPad app was downloaded 50,000 times within five days after its introduction.<sup>21</sup> These Internet-based services are designed to be restricted to subscribers' home WiFi networks, but this does not necessarily mean that they are restricted to subscribers' homes. Particularly in urban areas and multi-dwelling housing units (e.g., condo and apartment buildings), WiFi signals are simultaneously available in numerous homes, and the reach of WiFi signals will only continue to grow.<sup>22</sup>

As is the case of all parties appearing before the Commission, Discovery is required to be honest in its representations to the Commission by observing its legal duty to be candid in its statements and to never misrepresent material facts.<sup>23</sup> In addition, Discovery is obligated to inform the Commission promptly of any changes in the material facts it described or the material representations it made.<sup>24</sup> In fact, this continuing obligation to ensure the accuracy of

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<sup>20</sup> See [http://optimum.custhelp.com/app/answers/detail/a\\_id/2698/kw/ipad/related/1](http://optimum.custhelp.com/app/answers/detail/a_id/2698/kw/ipad/related/1).

<sup>21</sup> See Darrell Etherington, *Cable Company iPad Apps Are Killing It*, GigaOM (Apr. 28, 2011) (available at <http://gigaom.com/apple/cable-company-ipad-apps-are-killing-it/>).

<sup>22</sup> For additional examples and details of Discovery programming made available via Internet distribution, see Sky Angel's *Renewed Petition for Temporary Standstill*, pp. 28-33.

<sup>23</sup> See *Mid-Ohio Comms., Inc.*, Decision, 60 RR 2d 986, ¶ 47 (Rev. Bd. 1986) (“[H]onesty and forthrightness remain of paramount concern to the Commission.”); *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C. Cir. 1985) (“[A]pplicants before the FCC are held to a high standard of candor and forthrightness.”). Section 1.65 precedent applies equally to determinations under Part 76 of the Commission's Rules. In 1999, the Commission revised its rules to consolidate the procedural requirements of most Part 76 filings into new §76.6. See *1998 Biennial Regulatory Review, Part 76 – Cable Television Service Pleading and Complaint Rules*, Report and Order, CS Docket No. 98-54 (rel. Jan. 8, 1999). Prior to that time, the note to §76.7 provided that “[e]ach party filing a petition, comments, opposition or other pleading pursuant to §76.7 is responsible for the continuing accuracy and completeness of all information in such document. The provisions of §1.65 of this chapter are wholly applicable to pleadings involving §76.7 . . .” (emphasis added). See also 47 C.F.R. §76.3 (incorporating Part 1 of the Commission's rules into Part 76); *Marcus Cable Properties, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 7063, 7070 (CSB 1996) (citing to §§76.7 and 1.65 in noting that Commission rules “specifically recognize the potential significance of changes in circumstances that occur after the filing of a petition.”).

<sup>24</sup> See 47 C.F.R. §76.6(a)(6) (“Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding.”); *Amendment of Part 76, Subpart B, and Part 78, Subpart B, of the Commission's Rules and Regulations Concerning Procedures in the Cable Television Service and Cable Television Relay Service*, FCC 74-553, ¶ 1 (1974) (“All parties need to be aware of

information furnished to the Commission even relates to non-material facts.<sup>25</sup> After all, “[t]he duty of absolute truth and candor is a fundamental requirement for those appearing before the Commission.”<sup>26</sup>

Clearly, Discovery has been in violation of its candor obligations for a long period of time – at least since November 18, 2010, when DISH launched its “true TV Everywhere” Internet distribution service – because Discovery never corrected its contrary representations in this proceeding.<sup>27</sup> Obviously, Discovery is permitting millions of DISH, TWC, and Cablevision subscribers (and likely many others) to receive its programming via the Internet.

Similarly, Discovery does not seem to be suffering any “harm” (to its “relationships” or otherwise) from permitting such broad-scale Internet distribution of its programming. Since it permits many millions of subscribers to receive its channels via the Internet, it is not credible that similar reception by a few thousand Sky Angel subscribers would cause it any harm at all. Notably, Discovery has failed to provide any evidence of actual or potential harm despite its allegations and the document requests and interrogatories served upon it by Sky Angel.

Discovery’s earlier claims about a lack of Internet distribution are false, and Discovery has failed to correct or acknowledge these changed circumstances (or its prior inaccurate

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their continuing obligation to update their pleadings.”); *Mid-Ohio*, 60 RR 2d 986, ¶ 35 (“Clearly, Section 1.65 . . . requires applicants for Commission authorizations to report substantial changes in matters of decisional significance.”); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981) (“[Section 1.65] requires that an applicant inform the Commission of *all* facts . . . that may be of decisional significance so that the Commission can make a realistic decision based on all relevant factors.”) (emphasis in original) (internal quotations and citations omitted).

<sup>25</sup> See *RKO*, 670 F.2d 215 (“The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.”) (quoting *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946)); *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983) (“[T]he Commission has long held that false statements in the course of the hearing process are, in and of themselves, of substantial significance . . .”).

<sup>26</sup> *SBC Comms., Inc.*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 19091, 19106 (2001) (emphasis added).

<sup>27</sup> See *EchoStar Satellite Corp. v. Young Broadcasting, Inc., et al.*, 16 FCC Rcd 15070, 15075 (CSB 2001) (finding a lack of candor by failing to disclose for at least 23 days that documents EchoStar alleged were confidential had been publicly released); *SBC*, 16 FCC Rcd at 19106 (“[A]lthough our rules require companies promptly to correct inaccurate or incomplete information submitted to the Commission, SBC took over two months after the company first focused on the fact that the affidavits were (or may have been) incorrect to notify the Commission . . .”).

statements) even though Sky Angel notified Discovery and the Commission on November 24, 2010 about DISH's "true TV everywhere" service.<sup>28</sup> In its responsive letter, rather than use the opportunity to update/correct the record in this proceeding as the Commission requires, Discovery instead described the new facts as "irrelevant to this case."<sup>29</sup> This ongoing failure, even after express notice, considerably aggravates Discovery's earlier failure to report these facts.<sup>30</sup> In addition, Discovery should have withdrawn its allegations of "harm," but failed to do so. Therefore, Sky Angel requests that the following actions be taken as a consequence of Discovery's violation of its candor obligations.

1. The Commission should grant the concurrently filed *Renewed Petition for Temporary Standstill*. As that Petition makes clear, changes in circumstances, and a more complete record, establish that issuing a temporary standstill is entirely warranted. Allowing Sky Angel, at least until the Commission rules on the merits of the program access complaint, to distribute Discovery programming under the terms of the Affiliation Agreement would be harmless to Discovery, supportive of the public interest, and in keeping with the FCC's definition and regulation of MVPDs. Such a standstill would be temporary only, pending final resolution of Sky Angel's program access complaint against Discovery.

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<sup>28</sup> See Letter from Charles R. Naftalin, Holland & Knight, LLP, counsel for Sky Angel, to Marlene H. Dortch, FCC (Nov. 24, 2010).

<sup>29</sup> Letter from Tara M. Corvo, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., counsel for Discovery, to Marlene H. Dortch, FCC (Dec. 3, 2010); see *Garden State Broadcasting Ltd. Partn. v. FCC*, 73 RR.2d 226 (D.C. Cir. 1993) ("Instead of producing evidence, Garden State responded to the Mass Media Bureau's concern by characterizing it as a 'quibble.'").

<sup>30</sup> See *Texas Comms. Ltd. Partn.*, Memorandum Opinion and Order, 7 FCC Rcd 3186, ¶ 10 (1992) ("BSI's petition put CHM on clear notice that a full, candid description of its current financial proposal and the steps taken to effectuate it was called for – a circumstance that considerably aggravates CHM's earlier failure to report . . ."), *aff'd*, *CHM Broadcasting Ltd. Partn. v. FCC*, 24 F.3d 1453 (D.C. Cir. 1994) ("When BSI questioned CHM's financial qualifications, it should have been clear to CHM that the issue may be of decisional significance."); *EchoStar*, 16 FCC Rcd at 15075 ("Indeed, it was the defendant in this proceeding, not EchoStar, that first brought these disclosures to the Commission's attention."); *RKO*, 670 F.2d 215 ("[RKO] could not have doubted their relevance once the filings and petitions of the intervenors put these questions before the Commission. We need not decide whether RKO's pleadings were affirmatively misleading – it is enough to find that they did not state the facts.").

2. The Commission should initiate an investigation into the truth of Discovery's earlier representations in this proceeding concerning Internet distribution and its alleged harm. In adopting the *Preliminary Standstill Order*, the Bureau clearly relied on Discovery's unequivocal statements that it would be harmed by Sky Angel's continued distribution of its programming, which demonstrates the significance of Discovery's inaccurate representations.<sup>31</sup> The public interest in the integrity of the Commission's processes, and in deterring the abuse of those processes, require such an investigation to determine if Discovery actually misrepresented facts during this proceeding in addition to lacking candor through failing to correct the record.<sup>32</sup>

3. The Commission should initiate an investigation to determine if Discovery made affirmative misrepresentations about Internet distribution and alleged "harm" in this proceeding. The first step in such an investigation should be for the Commission to immediately grant Sky Angel's *Motion to Compel*, filed with the Commission more than 13 months ago, on April 16, 2010. In that Motion, Sky Angel asked the Commission to order Discovery to comply with the discovery requests Sky Angel served on Discovery in accordance with the program access rules – requests Discovery refused to respond to based on a series of unfounded objections.<sup>33</sup> Prompt grant of that Motion could lead to the exact information the Commission needs to investigate whether Discovery affirmatively misrepresented material facts in this proceeding.<sup>34</sup> This

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<sup>31</sup> See *SBC*, 16 FCC Rcd at 19110 ("The significance of the inaccuracies to the proceeding is demonstrated by the Commission's express reliance on the reply affidavits in the text of the *Order*."); *Mid-Ohio*, 60 RR 2d 986, ¶ 43 ("This violation of Section 1.65 undermined the administrative fairness in the initial comparative hearing by withholding pertinent information . . .").

<sup>32</sup> See *Mid-Ohio*, 60 RR 2d 986, ¶ 46 ("The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission . . .").

<sup>33</sup> See *RKO*, 670 F.2d at 229 ("[T]he Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth,' and license applicants may not indulge in common-law pleading strategies of their own device.") (internal citation omitted).

<sup>34</sup> For example, as noted above, in objecting to, and refusing to comply with, Sky Angel's document requests and interrogatories, Discovery stated that it does not allow any MVPD to distribute its linear channels over the Internet. See *WWOR-TV, Inc.*, 7 FCC Rcd 636 (1992) (In finding a violation of the duty of candor, the Commission noted that the need to provide the withheld information could not be disputed in light of a discovery request specifically seeking the production of this evidence.).

information also could provide further proof that Discovery unlawfully discriminated against Sky Angel in violation of the program access rules, and thereby expedite Commission action on the merits of Sky Angel's Complaint.<sup>35</sup> As time continues to pass, Sky Angel is forced to expend additional sums, not only to defend its statutory rights against Discovery's unlawful actions, but also to continue expanding its service – a service that may not be economically feasible if the Commission accepts Discovery's unjustified defenses in this proceeding and permits Discovery, and other vertically-integrated programmers, to withhold their valuable programming from Sky Angel.

Therefore, Sky Angel respectfully requests that the Commission find that, at a minimum, Discovery has lacked candor before the Commission in the instant proceeding, and therefore grant the three items of relief currently requested by Sky Angel.

Respectfully submitted,

SKY ANGEL U.S., LLC



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May 27, 2011

*Its Attorneys*

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<sup>35</sup> Sky Angel notes the Commission's stated goal of resolving program access complaints within five months from the submission of a complaint related to a denial of programming. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order, 22 FCC Rcd 17791, 17856 (2007); *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3422 (1993) ("The staff is expected to issue a ruling on the merits expeditiously.").



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See <http://www.dishnetwork.com/tveverywhere/whatistveverywhere/default.aspx>)

Certificate of Service

I, Marianne Trana, a legal secretary with the firm of Holland & Knight LLP, hereby certify that on the 27th day of May 2011, a copy of the foregoing *Motion of Sky Angel U.S., LLC for Imposition of Sanctions Against Discovery Communications, LLC for Lack of Candor and for Possible Misrepresentation* was deposited in the U.S. mail, postage prepaid, first-class, addressed to:

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